MAR 1 2 1956
HAROLD B. WILLEY, C

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 726.

THE ORDER OF RAILROAD TELEGRAPHERS,
Petitioner,

vs.

NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY,
Debtor, GUY A. THOMPSON, Trustee,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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MOTION FOR SUBSTITUTION.

Effective March 1, 1956, the reorganized Missouri Pacific Railroad Company succeeded to all rights and liabilities of Guy A. Thompson, Trustee, New Orleans, Texas & Mexico Railway Company, Debtor. Missouri Pacific Railroad Company therefore requests and consents that it be substituted as respondent.

STATEMENT.

The decision of the Eighth Circuit sought to be reviewed grows out of a proceeding to enforce Award No. 4734 of the National Railroad Adjustment Board, Third Division. The award will be found following page 8 in the printed record.

The issues entering into the lower Court's determination of this case were not particularly complicated or perplexing. They involved a factual finding, amply supported by evidence, to the effect that the Telegraphers were seeking to take certain clerical work away from the Clerks, and a finding of law that the Clerks under such circumstances were "involved" parties before the Adjustment Board and were "indispensable parties" in the Court action to enforce the award. The findings of the District Court which were approved by the Court of Appeals are in part as follows (Rec. p. 25; Appendix to Petitioner's Brief, p. 9a):

> "The intent and purpose of former Award No. 2254 in favor of the Clerks was to give the disputed clerical work at the station of Anchorage to members of the Clerks' organization. The intent and purpose of the subsequent Award No. 4734 of the same division of the Adjustment Board now under consideration was to give the same disputed clerical work at the station at Anchorage to the members of the Telegraphers' organization. Both organizations claimed the clerical work in controversy and not merely pay for the work performed. * * * The giving of the clerical work to the Clerks under Award 2254 of necessity took that work away from the Telegraphers. To now give the disputed clerical work to the Telegraphers under authority of Award No. 4734 will of necessity take that work away from a member of the Clerks' organization who is now performing the clerical work as Cashier at the station of Anchorage. The controversy now before the Court therefore involves conflicting claims of the Clerks and the Telegraphers to the same clerical work. The Clerks are involved in the dispute as that term is used in Section 3, First (j) of the Railway Labor Act."

The Court of Appeals not only sustained this finding, but also found that in the Court action to enforce the award, the clerks were indispensable parties, and that the

refusal of the Telegraphers to bring in the Clerks as indispensable parties (R. p. 15) constituted an additional ground for the dismissal of the case (Appendix to Petitioner's Brief, p. 14a).

It has been stipulated in the case at bar that at the time the Adjustment Board handed down Award No. 4734, February 28, 1950, and during the period that the claim giving rise to the award was pending, it was neither the policy nor the practice of the Third Division to permit persons or organizations whose relationship to the controversy was like that of the Clerks' organization to intervene or to notify them of the pendency of hearing of such proceedings before the Board (R. 16). The Carrier was therefore not required to go through the useless procedure of petitioning the Board to bring in the Clerks, nor did the fact that the Clerks had actual knowledge of the pendency of the controversy relieve the Board from complying with the requirements of Section 3, First (j).

Prior to September 6, 1951, the Third Division of the Adjustment Board had consistently refused to notify parties involved in a dispute submitted to the Board unless they were parties to the submission. On that date, in *Third Division Award No. 5432*, Referee Parker, speaking for the Board in *Order of Railroad Telegraphers v. Reading Company*, said:

> "From what has been heretofore related, it becomes apparent the established law of the land now is that the provisions of Section 3, First (j), supra, require that notice be given to the Clerks' Organization under the existing facts and circumstances of the case now before us. This Board is no greater than the source of its creation. When that source gave the courts power to set aside its orders and that authority is exercised in the manner above indicated we not only have the right but it becomes our duty to adopt and

follow a practice which the courts definitely indicate will give validity to what are now held by them to be invalid awards. With the rule so well established to hold otherwise can only result in unnecessary waste of time and useless expenditure of funds on the part of the employes, the carriers and the Board. Therefore we bow to the inevitable and, notwithstanding what may be found to the contrary in any of our previous awards, hold that this case cannot now be heard on its merits because it appears from the records that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, representing employes having rights that might be affected by our decision, were not served with notice of the filing of the claim and given an opportunity to be present and heard throughout all stages of the proceedings. In such a situation, the proper procedure in our opinion is to dismiss the claim without prejudice, thereby affording the claimant an opportunity to take whatever action it may deem advisable in the future."

It remained for Referee Lloyd H. Bailor, in *Fourth Division Award No.* 918 to attempt to summarize the situation. He states:

"Board awards on the third party question have concerned factual situations where the alleged third party, while also an employe of the respondent carrier, is in a different craft or class and hence is covered by a separate agreement. As previously indicated, such alleged third party may be under the jurisdiction of the same or of a different Division of the Board. Illustrative of awards holding third party notice to be required where the alleged third party is subject to the same Division's jurisdiction are Third Division Awards 5432 (Parker, Referee) and 5599 (Robertson, Referee). Among awards holding to the contrary under this type of factual situation are Third

Division Awards 2253 (Swain, Referee) and 5785 (Wenke, Referee). In circumstances where the alleged third party is under the jurisdiction of another Board Division the awards have also been conflicting, those holding that notice is required being illustrated by Third Division Award 5751 (Munro, Referee) and First Division Award 14475 (Weeks, Referee). Contrary holdings under the same factual situation are exemplified by Third Division Awards 5702 (Wenke, Referee), 6203 (Shake, Referee), and Second Division Award 1628 (Carter, Referee)."

* * * * * * *

"No purpose would be served in debating this question. It is difficult to believe that the various courts that have ruled on the third party issue as above noted have been entirely unmindful of the limited jurisdiction aspect. Nor can we see the wisdom of pursuing a policy in direct contradiction to the Railway Labor Act as interpreted by the branch of the Federal Government specifically authorized by Congress to review actions of the Board under conditions set forth in the Act. We think the Board is compelled to deem as 'involved' all employes of a respondent carrier, regardless of craft or class, whose present job status may possibly be affected adversely by an order issued pursuant to an award in a given proceeding.

"Moreover, we are of the opinion that this procedure is made necessary even though the alleged third party comes within the jurisdiction of a Board Division other than the one before which the claim is properly filed. This conclusion naturally flows from the reasoning found in the above cited decisions. If the Fifth Amendment requires notice to an employe who may be deprived of his job although he is covered by a different agreement, notwithstanding the Board's 'limited jurisdiction' with respect to interpreting the agree-

ment under which the claim is filed, then we cannot see that the separation of jurisdiction among the several Board Divisions can nullify the mandate imposed by this Amendment as the Courts interpret it. Clearly the Railway Labor Act, from which the Board derives its authority, is subordinate to the provisions of the Constitution."

It is apparent from the foregoing that the giving of notice to involved parties is comparatively simple where, as in the case at bar, the conflicting crafts fall under the same division of the Board. It is also apparent that in many instances, crafts falling under different Divisions of the Board have been given opportunity to be heard in the same proceeding. The Board has authority to formulate its own rules of procedure, and if its members were of a mind to do so, it would certainly be feasible for some workable procedure to be formulated.

THE ISSUE.

The issue now raised by the petition for certiorari is whether, in the light of the factual findings, the Court of Appeals "has decided an important question of federal law which has not been, but should be, settled by this Court."

QUESTIONS PRESENTED.

Five questions are presented by Petitioner (Petitioner's Brief, pp. 2-3):

(1) The first question is deficient in that the claim presented to the Board by the Telegraphers in the case at bar was not merely that the Carrier had violated a collective bargaining agreement, but the Telegraphers also sought the taking of the work from a member of the Clerks' organization and the restoring of said work to a member of the Telegraphers' organization. The Clerks were "involved"

for this latter reason and not because of a mere alleged wrongful interpretation of the Telegraphers' agreement. We will discuss this under the heading, *"Requirements of Section 3, First (j) of the Railway Labor Act."*

(2) The second question presents whether actual knowledge of the proceedings by the Clerks satisfied the requirement of notice to involved parties. This does not properly present the issue. The District Court in his Third Conclusion of Law found (Rec. p. 26):

> "Neither formal notice nor actual knowledge, without opportunity to be heard, fulfills the purpose of the statute."

We will discuss this later in the brief under the heading, *"Notice Without Opportunity to Be Heard Is Not Sufficient."*

(3) The third question propounded by petitioner is whether failure of the Board to give such notice renders any award void. If notice is required and not given, certainly the award is unenforceable.

(4) The fourth question presented by petitioner is whether the Carrier may challenge the validity of the award for lack of notice to other involved parties. We will brief this under the heading, *"The Carrier Can Raise the Issues Here Presented."*

(5) The fifth question raises the issue as to whether suit of the Telegraphers should be dismissed because of their failure or refusal to bring in the Clerks as indispensable parties. This will be discussed under the heading, *"The Clerks Are Indispensable Parties."*

ARGUMENT.

Our present discussion of the foregoing problems will be confined to a consideration of whether important questions of federal law which should be settled by this Court are raised under the facts in this case.

Requirements of Section 3, First (j) of the Railway Labor Act.

Section 3, First (j), of the Railway Labor Act (Title 45, U. S. C. 153) provides:

> "* * * the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers *involved in any disputes submitted to them.*"

"Involved parties" do not become "parties to the dispute" until they have been brought into the proceedings before the Board. There can be no doubt, however, that the Clerks were "involved" in this controversy in which the Telegraphers sought to take the clerical work in question from the Clerks and restore it to the Telegraphers.

The claim of the Telegraphers is thus summarized in the concluding paragraph of their submission to the Board appearing on page 19 of Award No. 4734 (R. p. 9 et seq.), to-wit:

> "It is the claim of the Employees, based on these facts, that the position of star agent shall be restored and *all of the clerical work formerly performed by the star agent*, which was improperly removed, *shall be restored to the position* and the former incumbent restored thereto." (Emphasis added.)

In paragraph 8 of the Telegraphers' Complaint in the case at bar, it is alleged that "the plaintiff made claim on

the defendant that the positions of star (*) agent and first trick telegrapher *and the work belonging thereto* be restored * * *." (Emphasis added.)

The Courts below were therefore correct in stating that "both organizations claim the clerical work in controversy and not merely pay for the work performed" (Rec. p. 25).

Both of the Courts further fortified their findings that the Clerks were involved parties by reference to the decision of this Court in *Order of Railway Conductors v. Pitney*, 326 U. S. 361, 367, wherein the Court said (Appendix, Petitioner's Brief, pp. 9a-10a):

> "* * * interpretation of these contracts involves more than a mere construction of a 'document' in terms of ordinary meaning of words and their position. * * * For O. R. C.'s agreement with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and customer, that, too, must be taken into account and properly understood."

The difficult questions referred to in *Whitehouse v. Illinois Central*, 349 U. S. 366, 372, have not yet arisen in this case. Not until the Clerks, as involved parties, be given notice with opportunity to be heard, will the following controversial issues be raised, to-wit: (a) would there be any estoppel against the Clerks should they fail to avail themselves of the opportunity to be heard and to assert their contentions; and (b) if the Clerks appeared, would the Board's award respecting the jurisdictional controversy in question be binding upon the Clerks as well as upon the parties to the submission.

These questions are not in the present case, and therefore their importance does not present a reason for the granting of certiorari.

Accepting the factual findings of the two lower courts as controlling, the only question at issue is whether the Clerks were "involved" in the submission by the Telegraphers seeking to have the clerical work taken away from the Clerks and restored to the Telegraphers. If the Clerks were so involved, as the facts clearly indicate they were, the notice to them as involved parties was prerequisite to a vaild award. Even if the Board had no power to go further than indicated in the above quotation from *Order of Railway Conductors v. Pitney*, such notice to the Clerks as involved parties was required.

We respectfully submit that the requirements respecting the serving of notice on involved parties with opportunity to be heard does not of itself raise an issue of such importance as to warrant the granting of certiorari. It is not until after the lower court has had an opportunity to rule on the actions of the involved parties taken after notice by the Board with opportunity to be heard, that this Court can weigh the importance of the decision of the lower court on the issues then presented and can determine what it should do respecting the granting of certiorari. This Court obviously cannot surmise what might have been done had notice to involved parties been given and then proceed to pass upon the validity of such assumed transactions.

Notice Without Opportunity to Be Heard Is Not Sufficient.

The District Court, in his third Conclusion of Law, found (R. 26):

> "Neither formal notice nor actual knowledge, without opportunity to be heard, fulfills the purpose of the statute."

In support of their argument that actual notice is sufficient (Brief p. 22), counsel for appellant rely upon language in *Estes v. Union Terminal Co.*, 89 Fed. 2d 768;

Hunter v. A. T. & S. F. R. Co., 188 Fed 2d 294; and *Kirby v. Penn. R. Co.*, 188 Fed. 2d 793. Those cases were decided before it was established that the Board would hear only persons who received formal notice from it. Moreover, in those cases the courts recognized that those receiving actual notice should be allowed to participate in the proceeding and assumed that such persons would be afforded that right by the Board. For example, in the *Kirby* case the Court stated (188 Fed. 2d 798) that employees involved are "entitled to notice and an opportunity to be heard before the Adjustment Board." Similar statements are found in the *Estes* case (89 Fed. 2d 768, 779, 771) and the *Hunter* case (188 F. 2d 294, 301).

Later the courts became aware that the Board with conscious indifference and complete disregard for the numerous decisions of the Federal Courts had effectuated a custom and practice of denying persons having "actual notice" the right to participate in proceedings before it. One of the first cases to consider this question was *Allain v. Tummon*, 212 F. 2d 32. In that case, the Court held that the "actual notice" rule should be abandoned in view of such policy of the Board. In this connection, the Court said (pp. 35-36):

> "It was established herein that had the plaintiffs or their union obtained the knowledge that the claim of the dining car stewards was pending before the Board, they would not have been permitted to file a written submission, offer testimony, cross-examine witnesses, make an argument, or otherwise participate in the hearing. It is thus apparent that a statement in our opinion in the second *Hunter* case is no longer applicable. In that case we said, 188 F. 2d 294, 301: 'We hold that all plaintiffs who were or could be adversely affected by the order and award were entitled to notice under the statute. Actual notice of the hearings for sufficient period prior thereto to permit

> plaintiffs to be present and to be heard is all that is required. This is a proceeding in equity and any plaintiff who had actual notice of the hearings, or authorized the Santa Fe to represent him thereat, is estopped from relying on the Board's failure to serve formal notice thereof upon him.'
>
> "Although we indicated in that opinion that actual notice of the hearing for a sufficient period prior thereto to permit plaintiffs to be present and to be heard was sufficient, it now appears that actual notice to the plaintiffs or their union would have availed them nothing. Notice without the opportunity to be heard does not satisfy the requirements of due process."

That notice of a hearing without opportunity to be heard would be futile is no such new announcement of the law as to warrant the granting of certiorari. As far back as *Windsor v. McVeigh*, 93 U. S. 274, 277-278, Mr. Justice Field said:

> "* * * Notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party: Appear and you shall be heard; and, when he has appeared, saying: Your appearance shall not be recognized, and you shall not be heard."

The second "question presented" on page 2 of Petitioner's Brief does not therefore present a new and important question of federal law which needs to be settled by this Court.

The Carrier Can Raise the Issues Here Presented.

The Carrier as well as the Clerks has a vital interest in the adjudication of conflicting claims to clerical station work, and is, therefore, entitled to have enforced the requirements of Section 3, First (j) of the Railway Labor Act. It can give the work to only one craft. It should not be confronted, as in the case at bar, with conflicting separate awards in favor of both crafts. As said by the Court of Appeals of the Seventh Circuit in *Allain v. Tummon et al.*, 212 Fed. 2d 32:

> "We conclude that defendant carrier may raise the point that employees involved in the dispute had no notice or knowledge of the hearing, and no opportunity to be heard before the Adjustment Board. A party is entitled to an award that will protect it in the event that it complies."

In *Kirby v. Penn. R. Co.*, 188 Fed. 2d 793, 798-799, the Court of Appeals of the Third Circuit, to the same effect, said:

> "If the Carrier is not permitted to raise the question of notice to employees, it is in a dilemma in deciding whether to comply with the Board order. If it complies it may be exposed to suit by the ousted employees for back pay and reinstatement. If it refuses to comply it may increase the amount of back pay owed the claimants. Either way it runs the risk of paying two groups of employees for the same work.
>
> * * * * * * *
>
> "We conclude that defendant Carrier may raise the point that employees involved in the dispute had no notice or knowledge of the hearing, and no opportunity to be heard before the Adjustment Board. A party is entitled to an award that will protect it in the event that it complies."

In *Railroad Yardmasters v. Indiana Harbor Belt R. Co.*, 166 Fed. 2d 326, 331, the Seventh Circuit Court of Appeals said:

> "It also seems reasonable to think that the defendant was entitled to an order which would protect it in the event of compliance. What authority did it have to demote Baker when he was not a party to the proceeding and was not named as an employee to be deprived of his seniority?"

The implied ruling of the lower court that the carrier in the case at bar was therefore a proper party to object to the Board's failure to comply with the notice requirement of Section 3, First (j), does not present an important question of federal law which needs to be settled by this Court.

Clerks Are Indispensable Parties.

The Court of Appeals in the decision here sought to be reviewed had the following to say with respect to the necessity of bringing in the Clerks as indispensable parties (Appendix to Petitioner's Brief, pp. 14a-15a):

> "It is contended here for the carrier appellee that the judgment of dismissal appealed from should be sustained on the further ground, not passed on below, 'that said Award (No. 4734) is unenforceable for want of indispensable parties in this pending court proceeding.'
>
> "The point has been briefed for the parties pro and con and we express our conclusion that the contention should be sustained. Enforcement of Award No. 4734 prayed for in the plaintiff's complaint in this suit would necessarily include the issuance by the Federal Court of a mandate requiring the defendant carrier to dispossess a clerk now in its employ of his job. The Clerk's claim of right to the job has been determined by an Award of the Board and his interest in the suit

to dispossess him of it is real and obvious. Yet neither he nor his union has been made a party to this suit and the object of the suit is to have the Court dispossess him without hearing him.

"The subsection (p) under which this action was brought provides 'Such suit in the District Court shall proceed in all respects as other civil suits * * *' (with certain exceptions not here relevant). It is well settled that a Federal Court will not proceed to final decision of a controversy brought before it without the presence of all 'who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.' *Shields v. Barrow*, 58 U. S. 129, l. c. 139; *Wesson v. Crain*, 8th Cir., 165 F. 2d 6, l. c. 9, and cases cited. Rule 19 of the Rules of Civil Procedure has not modified the requirement as to indispensable parties. *Wesson v. Crain*, supra, and the undisputed facts in this case demonstrate that the Clerks are indispensable parties without whose presence justice cannot be done.

"It is argued for the carrier that in consequence of the indispensability of the Clerks to a just determination of the complaint herein and the consequent duty of the plaintiff to bring them in as parties, the controversy between the Telegraphers and the Clerks as to the right to the jobs in question becomes justiciable. We confine our decision on the question of necessary parties to the holding that the judgment of dismissal of the plaintiff's case was justified by the lack of indispensable parties defendant, to-wit, Clerks."

Here it is apparent from the language quoted the decision of the lower court went no further than to hold that the Clerks whose jobs were sought to be taken away from

them were indispensable parties. To this extent the opinion raises no question that is so unusual or of such public interest as to necessitate a review by this Court. If the Telegraphers had elected to bring in the Clerks as indispensable parties, a more complicated situation would have been presented. The Court must then have determined whether, with two conflicting decisions of the Adjustment Board, one in favor of the Clerks and the other in favor of the Telegraphers, this jurisdictional controversy continued to be non-justiciable, and if so, whether it was the duty of the court to dismiss the suit brought by the Telegraphers for the enforcement of the award in their favor. In other words, with the Clerks brought into the case, the Court of Appeals would have been forced to answer some of the questions raised in *Whitehouse v. Illinois Central*, 349 U. S. 366, 372. In its second affirmative defense (R. p. 11), and at the very inception of the case (R. p. 15), the Carrier objected to the proceedings in the absence of the Clerks, and at that time the Telegraphers made it clear that they would not seek to have the Clerks made parties. This greatly simplified the issue to be determined by the Court of Appeals and made it unnecessary for that court to decide what action would have been taken had the Telegraphers elected to bring the Clerks into the case.

In the light of the conflicting decisions of the Adjustment Board, we are personally of the opinion that a justiciable controversy would have been presented, but the action taken by the Telegraphers made a decision on this point unnecessary. Under the circumstances there is nothing in this phase of the case to require review by this Court.

CONCLUSION.

As a famous Missouri editor once said: "I am an old man and have had many troubles, most of which never occurred." It is so with the perplexing questions that

might have arisen, but which actually did not arise in the presentation of this case. Dealing with these perplexing questions, which are here conspicuous by their absence, this Court in *Whitehouse v. Illinois Central*, 349 U. S. 366, 372, said: "Their difficulty admonishes us to observe the wise limitations on our own function and to confine ourselves to deciding only what is necessary to the disposition of the immediate case."

The propriety of that suggestion cannot be questioned, and when applied to the case at bar would make the granting of a writ of certiorari improvident.

Respectfully submitted,

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